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No 06 564

IN THE
Supreme Court of the United States

Thomas D Pinks and Billie Jo Campbell
Petitioners

v

North Dakota
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of North Dakota

REPLY BRIEF FOR PETITIONERS

Michael R Hoffman
P O Box 1056
120 N Third Street
Suite 100
Bismarck ND 58502
Attorney for Thomas David Pinks

Kent M Morrow
411 N Fourth Street #6
Bismarck ND 58501
Attorney for Billie Jo Campbell

Jeffrey L Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford CA 94305
(650) 724 7081

Additional attorneys on inside cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

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REPLY BRIEF FOR PETITIONERS

The North Dakota Supreme Court held, at the State's urging, that the prosecution may introduce a state forensic examiner's crime laboratory report against the accused as a substitute for the examiner's live testimony, so long as the accused is left with the ability to subpoena the forensic examiner as part of his defense. The State, however, does not attempt to defend the merits of this decision. Nor does it dispute its importance to the administration of criminal justice. Nevertheless, the State asks this Court to deny review because the conflict of authority the North Dakota Supreme Court's decision deepens is not yet fully developed and because this case supposedly has vehicle deficiencies.

None of the State's arguments withstands scrutiny. The North Dakota Supreme Court's decision squarely implicates a multi-pronged conflict that is fully entrenched and ever growing. Furthermore, this case is an ideal vehicle for resolving that conflict and for ensuring that the Confrontation Clause is no longer subverted in the manner condoned by the North Dakota Supreme Court and several others.

I. The North Dakota Supreme Court Reached and Resolved the Question Presented.

The State first claims that "Petitioners ask this Court to decide an issue that the North Dakota Supreme Court expressly declined to decide." BIO 4. This assertion, however, is patently untrue. Petitioners ask this Court to decide "[w]hether the Sixth Amendment's Confrontation Clause permits a prosecutor to introduce a state forensic examiner's crime laboratory report against the accused as a substitute for the forensic examiner's live testimony, so long as the accused is left with the ability to subpoena the forensic examiner as part of his defense." Pet. for Cert. i. The North

Dakota Supreme Court plainly resolved that question against Petitioners, and the State does not contend otherwise. Accordingly, there is no basis for the State to argue that this Court should deny review on the ground that the question presented was not resolved below.

The State is correct, of course, insofar as it simply highlights that the North Dakota Supreme Court declined to resolve the question presented *in a particular way* – namely, by determining whether state crime laboratory reports are "testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004). But this aspect of the decision below does not introduce any impediment to this Court's resolving the question presented. As Petitioners explained in the petition for certiorari, every time a defendant objects on confrontation grounds to the government's introducing a state crime laboratory report as a substitute for a forensic examiner's live testimony, that objection raises two sub-issues: (1) whether a defendant's ability to subpoena the state forensic examiner who prepared the report obviates any confrontation issue; and (2) whether such a report is testimonial. *See* Pet. for Cert. 8, 18. Some courts, such as the North Dakota Supreme Court (Pet. App. 8a-9a), have resolved such objections by ruling against defendants on the first ground; other courts, such as the trial court here (Pet. App. 12a-16a), have resolved the issue by ruling against defendants on the second ground; and still other courts have resolved the issue by ruling against the government on both grounds and thus finding a Sixth Amendment violation. *See* Pet. for Cert. 9-18; *infra* at 4, 5, 7 (new decisions). Far from presenting vehicle difficulties, this divergence of approaches evinces exactly the kind of multi-faceted confusion that counsels in favor of granting certiorari.

Lest there be any doubt, there is nothing that could possibly be gained from waiting for a case in which a defendant challenges a decision below that was resolved on

"testimonial" grounds instead of "waiver unless subpoena" grounds. The State expressly takes the position here (as it did in the courts below) that the crime laboratory report here is nontestimonial, so this Court will receive full adversarial briefing on that score. BIO 4; Brief of Appellee, *State v. Campbell*, 2006 ND 168 (July 27, 2006), *available at* 2006 WL 2688087. And the State does not point to a single underlying fact or legal circumstance that needs to be developed in order to decide the issue. Indeed, numerous other courts have issued opinions on the topic, thus providing this Court with more than ample percolation with respect to it.[1]

II. The Conflict Among the State and Federal Courts is Real and Ever Deepening.

The State maintains that there is no "percolated lower court dispute" regarding whether a defendant's ability to subpoena a witness automatically satisfies the Confrontation Clause because (1) many of the conflicting cases pre-date *Crawford* and (2) the cases involving child witnesses instead of forensic examiners "are distinct from the present case." BIO 6-9. Neither of these contentions has merit. This division of authority is real, and it continues to deepen.

1. The State asserts that *Crawford* renders "inapposite" (BIO 6) previous decisions addressing whether a defendant's ability to subpoena an available witness allows the

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[1] Even if this Court were uncertain whether it wanted to resolve the testimonial question in this case, it would be well worth the expenditure of this Court's resources to grant review at least to resolve the propriety of the North Dakota Supreme Court's waiver-unless-subpoena holding. Courts, as Petitioners make clear in Part II, *infra*, are deeply divided on that subject, and the conflict reaches even beyond the context of state crime laboratory reports. After resolving that issue, this Court could resolve the testimonial aspect of the question presented or, if some unforeseeable reason arose to avoid that subject, this Court could simply remand the case.

government to introduce the witness's out-of-court statements in lieu of live testimony. But the State never provides any reason that this would be so. In fact, none exists.

Crawford was centrally concerned with whether a court's assessment that an out-of-court statement was reliable could satisfy the Confrontation Clause. This Court's decision did not directly address whether a defendant's ability to subpoena a witness whose out-of-court declaration the prosecution offers could satisfy the Confrontation Clause. But to whatever extent *Crawford* might be relevant to this question, it clearly did not *relax* the strictures of the Confrontation Clause. So it is plain that *Crawford* does not make the North Dakota Supreme Court's decision *more* defensible than it would have been before, which is what would have to be the case for the State's "intervening authority" suggestion to have any traction.

In any event, courts issued conflicting decisions on the question presented not only before *Crawford*, but they have done so after it as well. In addition to the North Dakota Supreme Court's decision here, the Tennessee Court of Criminal Appeals, adhering to a pre-*Crawford* decision from the Tennessee Supreme Court, has held that a defendant's ability to subpoena a forensic examiner automatically satisfies the Confrontation Clause. *State v. Kemper*, 2004 WL 2218471, at *3 (Tenn. Crim. App. Sept. 30, 2004), *appeal denied* (Tenn. 2005). The Virginia Court of Appeals – expressly following the decision at issue here in an opinion issued after the petition for certiorari was filed – has reached the same conclusion. *Brooks v. Commonwealth*, ___ S.E.2d ___, 2006 WL 3714536, at *5-*6 (Va. Ct. App. Dec. 19, 2006).[2] The Georgia Court of Appeals has invoked the same

[2] The Virginia Court of Appeals contended that it was following not only the decision at issue here but also decisions from other states that have upheld "good faith" and "notice and demand" prerequisites for

analysis in holding that the prosecution may introduce a child's videotaped statement in lieu of live testimony at trial. *Starr v. State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004).

On the other hand, the District of Columbia Court of Appeals (that jurisdiction's high court) – in another opinion issued after the petition for certiorari was filed – and the Florida Court of Appeals have held that a defendant's ability to subpoena a forensic examiner does not allow the prosecution, over a defendant's objection, to introduce the examiner's report in lieu of live testimony. *Thomas v. United States*, ___ A.2d ___, 2006 WL 3794331, at *9-10 (D.C. Dec. 28, 2006); *Belvin v. State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App.), *rev. granted*, 928 So. 2d 336 (Fla. 2006). The District of Columbia Court of Appeals reversed that court's previous position and gives the issue a particularly thorough treatment. The Maryland Court of Appeals (that juris-diction's highest court) and the Texas Court of Appeals have reached the same result in cases involving other types of witnesses. *Snowden v. State*, 867 A.2d 314, 332 (Md. 2005); *Bratton v. State*, 156 S.W.3d 689, 694 (Tex. App.), *rev. denied* (Tex. 2005).

In short, no matter how the decisions respecting the question presented are temporally sorted, they are in deep and irreconcilable conflict. There is no possibility for uniformity until this Court steps in.

2. The State's suggestion that the cases involving child witnesses are inapposite because none involved a law like North Dakota's forensic examiner statute similarly lacks

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defendants' requiring the government to offer the live testimony of forensic examiners. But as the petition for certiorari explains, such statutory prerequisites are not at issue here because, when they are satisfied, the prosecution must still call the witness to the stand at trial. *See* Pet. for Cert. 10 n.2, 25 n.8. By contrast, the Virginia procedure, like the North Dakota procedure at issue here, requires the *defendant* to call the forensic examiner to testify.

merit. The petition for certiorari explains, and the State does not dispute, that the Compulsory Process Clause already affords defendants the very subpoena power that North Dakota's statute purports to give them. Pet. for Cert. 20, 26. For this reason, courts have not distinguished among types of witnesses in deciding whether a defendant's ability to subpoena a witness allows the prosecution, over the defendant's objection, to introduce the witness's out-of-court statements as a substitute for live testimony. *See Thomas*, ___ A.2d at ___, 2006 WL 3794331, at *9-10 (relying in part on child witness cases to reject government's waiver-unless-subpoena argument). *See generally* Pet. for Cert. 10-11, 13-14 (setting forth courts' analyses with respect to various types of witnesses). The North Dakota Supreme Court's decision in *State v. Blue*, 717 N.W.2d 558 (N.D. 2006), is no different in this regard. There, a trial court order "precluded [the defendant] from even attempting to call his accuser [a child] at trial," *id.* at 556, so the North Dakota Supreme Court had no occasion to consider whether the defendant's ability to subpoena the child would have allowed the State to introduce the child's out-of-court videotaped statement as a substitute for live testimony.

But as with the State's assertion regarding pre-*Crawford* cases, there is no need to dwell on this subject. Even if one considers nothing more than cases involving forensic examiners, courts are deeply and intractably divided over whether a defendant's statutory ability to subpoena such an examiner allows the prosecution to introduce the examiner's crime laboratory report as a substitute for live testimony. Three state courts of last resort and one state intermediate court have held that it does. *See* Pet. for Cert. 9-10; *Brooks*, ___ S.E.2d at ___, 2006 WL 3714356, at *3-6. One federal court of appeals, four state courts of last resort, and one state intermediate court have held that it does not. *See* Pet. for Cert. 11-13; *Thomas*, ___ A.2d at ___, 2006 WL

3794331, at *9-10. This disagreement alone is more than enough to warrant this Court's review.

3. The State does not contest that the sub-issue of whether state forensic laboratory reports are testimonial is worthy of this Court's immediate review. Petitioners, therefore, simply note that since they filed the petition for certiorari, one more state court of last resort and one more state intermediate court have held that such reports are testimonial, while one other state intermediate court have held that such a report is not. *Compare Thomas*, ___ A.2d at ___, 2006 WL 3794331, at *6-9 (report identifying substance as illegal drug), *and Deener v. State*, ___ S.W.3d ___, 2006 WL 3479941, at *3 (Tex. App. Dec. 4, 2006) (same), *with People v. Meekins*, ___ N.Y.S.2d ___, 2006 WL 3438279, at *1 (N.Y. App. Div. Nov. 28, 2006) (DNA report). This escalating divergence of authority, just as with the subpoena sub-issue, strongly militates toward prompt review.

III. The State's Harmless-Error Argument Does Not Provide a Legitimate Reason to Deny Review.

The State never contended in the North Dakota Supreme Court that any error in admitting the crime laboratory report here could be considered harmless. *See* Brief of Appellee, *State v. Campbell*, 2006 ND 168 (July 27, 2006), *available at* 2006 WL 2688087. Nor did the North Dakota Supreme Court so much as suggest that possibility. Pet. App. 1a-9a. The State nonetheless argues now that "any error that might be found in this case would be harmless" because the arresting police officer testified that he believed the items he seized contained marijuana and because Petitioners did not contest the accuracy of the report during their closing arguments. BIO 9-10.

The State's arguments do not provide any reason to believe this Court would need to deviate here from its "general custom" of reversing on the federal constitutional

issue and remanding for the lower court to consider in the first instance any harmless-error argument that might properly be advanced. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139 (1999). The fact that the officer testified that articles in Petitioners' possession looked like and smelled like marijuana hardly dictates that the state crime laboratory report was cumulative evidence. The report purported to establish with scientific certainty that the articles that Petitioners' possessed were contraband. That is why the North Dakota Supreme Court called the forensic examiner's report the "primary evidence offered to establish the seized property contained marijuana." Pet. App. 5a-6a. And that is why the prosecutor in this very case expressly relied in his closing argument on the forensic examiner's report as providing the critical evidence that "distinguish[ed] between a legal product and an illegal product" in Petitioners' possession. Pet. for Cert. 7 (quoting Tr. 178, lines 1-9 (June 13, 2005)).

Nor does Petitioners' inability to contest the findings of the State's forensic laboratory report during closing arguments suggest that admitting the report was harmless error. This inability quite possibly derived directly from the trial court's earlier improper denial of Petitioners' confrontation objection. A core purpose of the Confrontation Clause is to permit defendants to observe witnesses' live testimony and then probe on cross-examination the accuracy of the prosecution's evidence, without having to risk harming their own cases by calling the prosecution's witnesses themselves. *See* Pet. for Cert. 21; *Amicus* Br. of Law Professors, The National Ass'n of Criminal Defense Lawyers, The Innocence Project, and The Public Defender Service for the District of Columbia, at 3-10. But the trial court improperly precluded Petitioners from doing so. One thus cannot speculate what would have been revealed or how Petitioners would have conducted their defenses if the trial court had honored their confrontation rights.

CONCLUSION

For the foregoing reasons, as well as those in the petition for writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Michael R. Hoffman
P.O. Box 1056
120 N. Third Street
Suite 100
Bismarck, ND 58502
Attorney for Thomas David Pinks

Kent M. Morrow
411 N. Fourth Street #6
Bismarck, ND 58501
Attorney for Billie Jo Campbell

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016

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